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NO. 71-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

C. J. PAUL DELOME, *Petitioner*

v.

UNION BARGE LINE COMPANY, *Respondent*

v.

PLATZER SHIPYARD, INC., *Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix 1 of Petition) is reported at 444 F.2d 225 (Fifth Circuit, 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Did Union Barge Line Company owe a duty of seaworthiness to Petitioner, C. J. Paul Delome?

A. Petitioner was not engaged in traditional duties of seaman.

B. The *UBL550* was not in navigation.

2. Did Petitioner, C. J. Paul Delome, have a maritime cause of action for negligence?

A. There was no admiralty jurisdiction since the injury occurred on land.

B. The Extension of Admiralty Jurisdiction Act does not apply under the facts of this case.

C. Since the *UBL550* was under the exclusive control of the third party ship repair company, Union Barge Line Company owed no duty to Petitioner under this Court's decision in *West v. The United States*, 361 U.S. 118 (1959).

STATUTE INVOLVED

46 U.S.C. 740; Extension of Admiralty Jurisdiction Act printed in Appendix A.

STATEMENT

Petitioner C. J. Paul Delome, a shipyard worker, was injured while working on a marine railway in Greens Bayou, Texas. Petitioner was an employee of Platzer Shipyards, Inc., who had contracted with Union Barge Line Company to repair the *UBL 550*, an open hopper cargo barge which had previously been damaged in the

bow section, thus necessitating the repairs. The barge was removed from the water and placed upon a marine railway where a section of the bow, measuring approximately 10 ft. by 12 ft., was cut away and replaced with a new pre-cut section.

Petitioner was a metal worker and shipfitter who was engaged in making the repairs. While thus engaged he was required to go on the barge where he tripped and fell, sustaining the injuries made the basis of his claim.

Petitioner sued under the General Maritime Law and recovered a judgment against Union Barge Line Company in the trial court which was subsequently vacated and remanded by the Court of Appeals for the Fifth Circuit.

The Court of Appeals held in substance that the trial court's finding that Delome was engaged in traditional work of seamen was clearly erroneous, thus he was not entitled to the warranty of seaworthiness. Further the Court held that the trial court had no admiralty jurisdiction over the cause of action for negligence since the vessel, at the time of the accident, was not situated on the navigable waters of the United States.

ARGUMENT

1. Did Union Barge Line Company owe a duty of seaworthiness to the Petitioner?

A. Petitioner was not engaged in traditional duties of seaman.

Petitioner's cause of action was predicated on the proposition that he was within that class of shoreside workers given maritime remedies under this Court's decisions in

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *Pope & Talbot v. Hawn,* 346 U.S. 406 (1953) and their progeny.

This basis of the *Sieracki* doctrine was that a ship owner could not avoid his traditional responsibilities imposed by *Mahnich v. Southern S.S. Co.,* 321 U.S. 96 (1943) by parceling out the ship's work to others. Consequently this Court held that where a ship owner delegated the work to third parties, he did not thereby escape his responsibility to provide and maintain a seaworthy ship.

But it has become equally clear that a ship owner is not liable to all who may do work on the ship, for his duty extends only to those situations, the Jones Act aside, where he would be responsible had the work been performed by his own employees. The critical question in most cases is whether the injured workman was performing seamen's work, or as most generally articulated, traditional work of seamen. Was it customary for the ship's crew to do the type of work in which the injured third party was engaged, or was this the type of task that had always been done by others?

In answering this question, the Court has formulated many guidelines. In *West v. United States,* 361 U.S. 118 (1959) this Court focused its inquiry on the status of the vessel, the pattern of repairs and the exclusive nature of the work contracted to be done. And *West* made clear one point of extreme importance here. The status of the ship—that is, whether it is or is not in navigation—is an independent element of the ship owner's duty apart from whether a duty is owed to the one actually injured. For as this Court said in *West,* if the vessel is not in naviga-

tion, there can be no warranty of seaworthiness *to any person.*

Consequently, for our purposes here, Petitioner has two hurdles to overcome. First, he must show that the vessel upon which he was injured was in navigation and thus warranted its seaworthiness, not only to him, but to anyone. Second, he must show that he has the required status and is one to whom the warranty is owed.

This second element was found to be lacking by the Court of Appeals and presents merely a question of evidence of no particular national import.

The record in this case clearly reflects that Petitioner was in no way exposed to any of the hazards encountered by seamen. The *UBL 550* was damaged to the extent that the repairs could only be made with the barge removed from the navigable water. (App. 643). The water tight integrity of the hull was invaded, and although the repairs were minor as far as the total cost was concerned, they were clearly more than simple preventive maintenance.

The Court of Appeal's focus on the equipment used in repairing the vessel is perfectly logical. This equipment was not employed as a technological convenience but was absolutely necessary if the barge was to be repaired at all. Obviously, the employment of sandblasting equipment to replace the traditional method of hand chipping is a mere technological advance in method by which the same work is done; consequently the status of the workman is not necessarily changed by the fact that he is using modern labor-saving devices. But here, welding torches, a winch truck and crane were essential to perform the

contract of repairs—repairs that "could have been accomplished only on a dry docked vessel with special equipment, and by a trained crew of shipfitters, not seamen." 444 F.2d at _____.

As to Petitioner's contentions with respect to the testimony of the expert witness, it is noted that all the expert actually established was that it was traditional for seamen to perform repairs on their vessels, a point that is hardly disputed. But this furnishes no support for the District Court's conclusion with respect to the status of the Petitioner. For as this Court said in *United N. Y. and N. J. Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613 (1959):

> "It avails nothing to say that the decedent was an 'electrician' and that many modern ships carry electricians in their crew.
>
> Pope & Talbot, Inc. v. Hawn, explicitly teaches that such labels in this domain are meaningless. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is * * * that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' "

Such is the case at bar. The District Court's conclusion can not be supported by indulging in the "euphemism" that Petitioner was repairing part of the ship and that it is a traditional duty of seamen to repair ships. The inescapable fact is that here, as in *Halecki*, Petitioner "was not doing what any crew member had ever done." See *Drake v. E. I. DuPont De Nemours & Company*, 432 F.2d 276 (5th

Cir., 1970); *McCowen v. Humble Oil & Refining Company,* 405 F.2d 596 (4th Cir., 1969); *Atkins v. Greenville Shipbuliding Corporation,* 411 F.2d 279 (5th Cir., 1969).

B. The *UBL550* was not in navigation.

As above noted, a ship owner's duty to furnish a seaworthy vessel exists only with respect to those vessels that are in navigation. *West v. U. S.,* 361 U.S. 118 (1959); *Roper v. U. S.,* 368 U.S. 20 (1961). *Compare Watz v. Zapata Offshore Company, Et Al,* 431 F.2d 100 (5th Cir., 1970). As this Court said in *West,* the inquiry is focused upon the status of the ship, the pattern of repair and the extensive nature of the work contracted to be done.

As to the status of the ship, it is undisputed that the barge was on a marine railway and under the sole and exclusive control of the shipyard. It had no crew aboard, nor did any employee or representative of Respondent have anything to do with the carrying out of the repairs.

As to the pattern of repairs, it is likewise undisputed that while the total cost was small, it was, nevertheless, necessary to remove the vessel from the water and to physically remove a large section of the bow below the water line.

As was the case in *West,* the *UBL 550* was, as anyone could see, not in maritime service. Petitioner took his orders from the contractor, not the ship owner, and the barge was at the shipyard for the sole purpose of making her seaworthy so that she could return to trade and commerce. The barge clearly had been withdrawn from navigation.

2. Did Petitioner have a maritime cause of action for negligence?

A. There was no admiralty jurisdiction since the injury occurred on land.

B. The Extension of Admiralty Jurisdiction Act does not apply under the facts of this case.

This Court has held in case after case that maritime jurisdiction is limited to the water's edge, absent specific Congressional legislation or situations involving maritime contract. *The Plymouth,* 3 Wall. 20 (1866); *Grant Smith-Porter Ship Company v. Rohde,* 257 U.S. 469 (1922). *Compare Rodrique v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969).

The Court of Appeals accepted the proposition that maritime tort jurisdiction is governed by the locality of the tort and held that the District Court had no jurisdiction over the negligence claim. The Court of Appeals did not view the unseaworthiness count as a maritime tort and accordingly held that such liability is not governed by locality but by status. Respondent continues to urge that locality is determinative of jurisdiction with respect to both negligence and unseaworthiness but for the purpose of this reply will assume, without conceding, that the analysis of the Court of Appeals is correct.

In any event, there is no dispute about the fact that the *UBL 550* was situated entirely upon the land at the time of the Petitioner's injury, and as this Court observed in *Rodrique v. Aetna Casualty & Surety Company,* supra:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even

ramps or railways running into the sea." 395 U.S. at 360.

To extend jurisdiction under the General Admiralty Law to this case would clearly produce the anomalous results that this Court has studiously attempted to avoid in *Seas Shipping Company v. Sieracki,* supra; *Reed v. Yaka,* 373 U.S. 410 (1963); *Jackson v. Lykes Brothers SS Company,* 386 U.S. 731 (1967) and *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970), for it is clear that had a co-worker of the Petitioner been injured under the exact circumstances as Petitioner, but while working aboard a new and uncompleted vessel, such co-worker would have no recourse under the General Maritime Law. *Grant Smith-Porter Ship Company v. Rohde,* supra, *Desper v. Starved Rock Ferry Company,* 342 U.S. 187 (1952); *Hastings v. Mann,* 340 F.2d 910 (4th Cir. 1965). In such case, both are exposed to the same hazards, and both are engaged in essentially the same type of work. It would be manifestly unfair to give them different legal treatment.

With respect to the EXTENSION OF ADMIRALTY JURISDICTION ACT, 46 U.S.C. 740, it is clear that that Act applies only where the injury is caused by a vessel on navigable water, which this injury certainly was not. Not only was the vessel physically removed from the navigable water, but all of the defects found by the District Court involved the design of the vessel, which certainly did not occur on navigable water. If the District Court was correct in concluding that these designed features, such as the width of the walkway and the height of the combing, rendered the vessel unsafe, then it is obvious that these defects existed even prior to the com-

missioning and launching of the vessel in 1955, and were not related to the operation of the vessel or to the stowage of cargo thereof. *Compare Gutierrez v. Waterman SS Corporation,* 373 U.S. 206 (1963).

Moreover, the legislative history of the statute indicates that the primary purpose was to create a maritime cause of action in those situations involving collisions between vessels and shore structures. 1948 U. S. Code Cong. Service, 1898, and while *Gutierrez v. Waterman SS Corporation,* supra, has applied the act to maritime personal injuries, the Court has remained faithful to its purpose by requiring that the tort be referable to the vessel and its operations while on the navigable waters of the United States. Petitioner is simply asking the Court here to fashion a maritime remedy for anyone who is injured while performing any task that is in any way, however remote, related to the maritime industry. By seeking to avoid any requirement that the tort be committed by a vessel on navigable water, Petitioner would have this Court extend remedies which were after all designed to meet the peculiar hazards of maritime service to anyone at any time and in any place whether he is realistically subject to these hazards or not.

C. Since the *UBL550* was under the exclusive control of the third party ship repair company, Respondent owed no duty to Petitioner under this Court's decision in *West v. The United States,* 361 U.S. 118 (1959).

Regardless of the correctness of the jurisdictional holding by the Court of Appeals, the judgment of that Court is correct, for the reason that Respondent owed no duty

to Petitioner under this Court's decision in *West v. U. S.*, 361 U.S. 118 (1949). In that case the Court observed that a ship owner generally has a duty to exercise reasonable care to furnish a safe place to work. But the Court noted that this duty is not owed under circumstances where the ship owner has no control over the vessel or power either to supervise or to control the repair work in which the injured plaintiff is engaged. The Court observed:

> "The respondent (ship owner), having hired Atlantic (repair company) to perform the overhaul and reconditioning of the vessel * * * is under no duty to protect petitioner from risks that were inherent in the carrying out of the contract." 361 U.S. at 123.

The Court went on to observe that there might be situations of hidden dangers that would make the ship owner guilty of negligence even though he had no control over the repairs but that where the vessel was under the sole and exclusive control of the shipyard and where the injury resulted from a risk encountered in carrying out the contract of repairs, there could be no liability.

The evidence in this record is overwhelming, and in fact the trial court found that Delome was injured because while doing his work he encountered risks on the barge where he was ordered to go. There was no hidden danger, nor did Petitioner encounter a hazard unrelated to the repair contract. Although the dangers found by the District Court were not in themselves a subject of the repair contract, that fact is irrelevant because it is undisputed that the only reason for Delome's presence on the barge was by virtue of his performance of the contract of repairs.

The shipyard had the sole and exclusive control of the barge and knew of the hazards to be encountered; consequently as the Court said in *West*:

> "Any culpability here could be chargeable only to the contractor, not to the ship owner." 361 U.S. at 124.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, John D. Rienstra, Jr., attorney for Respondent Union Barge Line Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief in Opposition to the Granting of a Petition for Writ of Certiorari upon Mr. Ned Johnson, 320 College Street, Beaumont, Texas, Attorney for Petitioner, and Mr. Dewey J. Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas, Atto. ey for Respondent, Platzer Shipyard, Inc., by mailing three copies thereof, postage prepaid and properly addressed, on this 27 day of October, 1971.

APPENDIX A

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land.